

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

BRIDGEPORT MUSIC, INC., ET AL.       )  
  )  
v.    )     No. 3:01-0412  
  )     Judge Campbell/Brown  
11C MUSIC, ET AL.                         )

M E M O R A N D U M

I. INTRODUCTION

Currently pending before the Court are plaintiffs' motion to disqualify Bowen, Riley, Warnock & Jacobson, PLC ("the Bowen firm") (Docket Entry No. 41) and a motion by twenty-seven affiliated defendants ("the Time Warner defendants") to disqualify King & Ballow as against the Time Warner defendants (Docket Entry No. 100). These motions have been thoroughly briefed, and were argued to the undersigned at a hearing held on July 2, 2001. After consideration of the motion papers, affidavits, declarations, and other exhibits, as well as the oral argument of counsel, it is the judgment of the undersigned that both motions should be **DENIED** for the reasons stated herein.

This document was entered on  
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Rule 58 and / or Rule 79 (a).

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## II. DISCUSSION

### A. Plaintiffs' Motion to Disqualify the Bowen Firm

Plaintiffs seek the disqualification of the Bowen firm based upon that firm's hiring of Ms. Amy Martin, a former associate of plaintiffs' counsel's firm, King & Ballow. Ms. Martin left King & Ballow prior to the filing of the complaint in this matter. The facts surrounding her participation in preliminary research in support of the complaint, her proximity (physical and otherwise) to plaintiffs' counsel and their early engineering of this lawsuit, and her subsequent association with the Bowen firm are essentially undisputed. These facts, more thoroughly developed at the hearing of this motion and in the supporting papers, warrant a finding that Ms. Martin possesses confidences of these plaintiffs which compel her disqualification from any adverse representation, and the undersigned so found at the July 2, 2001 hearing. The sole issue remaining for this motion's resolution, then, is whether the risk of the Bowen firm's infection by this conflicted attorney was adequately avoided by the screening devices that firm employed, and, if so, whether even such an effective screen is sufficient to avoid the appearance of impropriety in this case.

As enunciated some seven weeks ago by the Tennessee Supreme Court, the test to be applied in determining whether

vicarious disqualification of a conflicted attorney's firm is mandated encompasses the provisions of Tennessee Code of Professional Responsibility Disciplinary Rule 5-105(D)<sup>1</sup>, as well as Formal Opinion 89-F-118<sup>2</sup>, which was adopted as an exception to the Disciplinary Rule; "[t]his exception shall be applicable on a case-by-case basis . . . ." Clinard v. Blackwood, 2001 WL 530834, \*3 (Tenn. May 18, 2001). This test was stated by the Clinard court as follows:

- 1) whether a substantial relationship exists between the subject matter of the former and present representations.
- 2) whether the presumption of shared confidences which arises from its determination that the representations are substantially related has been rebutted with respect to the former representation.
- 3) whether the presumption of shared confidences has been rebutted with respect to the present representation.

2001 WL 530834 at \*4. The first two questions having been answered to the undersigned's satisfaction affirmatively and negatively, respectively, it is the adequacy of those screening procedures employed by the Bowen firm, implicated at the third prong of the above test, which must be judged in light of the

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<sup>1</sup> Rule 5-105(D) states as follows: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with that lawyer or that lawyer's firm, may accept or continue such employment."

<sup>2</sup> In this Formal Opinion, the Board of Professional Responsibility of the Tennessee Supreme Court "approve[d] the use of screening procedures as a viable method to avoid the imputed or vicarious disqualification provisions of DR 5-105(D)." 1989 WL 534365 (March 10, 1989).

standards supplied in Clinard. "When screens can eliminate the sharing of confidences, a client's right to counsel of choice should be preserved." Id. at \*3.

Courts should consider the following non-exclusive list of factors to determine "whether the screening mechanisms reduce to an acceptable level the potential for prejudicial misuse of client confidences" such that the presumption of shared confidences is rebutted:

- 1) the structural organization of the law firm or office involved,
- 2) the likelihood of contact between the "infected" person and the specific attorneys and support personnel involved in the present representation,
- 3) the existence of law firm or office rules which prevent the "infected" person
  - a) from access to relevant files or other information pertaining to the present litigation and
  - b) from sharing in the fees derived from such litigation.

Evidence supporting these factors must be "objective and verifiable."

Id. at \*4 (quoting Tenn. Bd. Of Prof'l Resp., Formal Op. 89-F-118, 1989 WL 534635, \*3 (1989)).

After the July 2, 2001 hearing and in response to the Court's inquiries during that hearing, the Time Warner defendants filed the supplemental declarations of Ms. Martin and their attorney Jay Bowen, accompanied by various exhibits demonstrating the screening procedures and mechanisms which were employed as detailed in Mr. Bowen's original (Docket Entry No. 143) and supplemental (Docket Entry No. 211) declarations. Plaintiffs have responded to this filing by memorandum (Docket Entry No.

214), wherein they voice their concern over what the undersigned views as minor inconsistencies between the declarations, correspondence, and representations made at the hearing of this matter. Taking these concerns under advisement, the undersigned has scrutinized all submissions of the parties in conjunction with the oral argument of counsel, and is satisfied that the supplemental declarations submitted by the Time Warner defendants are not undermined by any prior representations as to the sequence of events related at the hearing or in these most recent declarations.<sup>3</sup>

It is evident that on May 11, 2001, Ms. Martin and Mr. Bowen had two brief conversations regarding the complaint filed in this matter, prior to the Bowen firm's being retained by the Time Warner defendants. The first brief conversation resulted in Mr. Bowen's asking Ms. Martin to obtain a copy of the complaint from King & Ballow, because of his prior representation of the Time Warner defendants and Ms. Martin's friendship with Ms. D'Lesli Davis, one of the King & Ballow attorneys primarily responsible for the drafting of the complaint. Upon receiving a

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<sup>3</sup> The undersigned notes that the Bowen firm would have been better advised to have alerted the Court at the hearing that they had in fact sought an outside opinion on their compliance with ethical standards, rather than making first mention of this precaution in their supplemental submission. That said, it is further noted that the opinion of Mr. Willis is of course not binding on the Court. Indeed, the same conclusions would have been reached regardless of Mr. Willis's opinion on the matter.

copy of the complaint later that day, Mr. Bowen questioned Ms. Martin as to the extent of her involvement in the matter while she was associated with King & Ballow, pursuant to office procedures for evaluating conflicts of interest.<sup>4</sup> Mr. Bowen advised Ms. Martin in both conversations that she should not discuss the matter with anyone at the firm, and that she would be screened from participation in the case if the Bowen firm were retained. (Docket Entry No. 211, ¶¶ 8-9; Docket Entry No. 143, ¶¶ 4-5).

On May 21, 2001, the Bowen firm was retained by the Time Warner defendants, prompting Mr. Bowen to distribute the firm's new business form to all attorneys. This form solicits responses regarding potential conflicts, which conflicts were indicated on Ms. Martin's form with respect to the instant litigation. On May 22<sup>nd</sup> or 23<sup>rd</sup>, 2001, Mr. Bowen again spoke with Ms. Martin regarding her new business form, the screening procedures that would be implemented, and the need for Ms. Martin

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<sup>4</sup> Both sides discussed at length a memorandum Ms. Martin prepared while at King & Ballow regarding issues in the present case. According to King & Ballow, the memo required research on "key issues" arising in the matter (see Docket Entry No. 42, ¶ 7), while Ms. Martin has stressed the general nature of the memo and its lack of importance (see Docket Entry No. 142, ¶¶ 8, 11). Having reviewed the memo in camera, the undersigned concludes that it is a general memo on two points of law, disclosing no particular sensitive material. However, the exact nature of the memo is a tempest in a teapot. The fact is that Ms. Martin worked on the present case while at King & Ballow and as such would be disqualified from representing any defendant, under any version of the importance of the memo. The controversy over the memo is just another example of the overstatements by both sides in this matter.

to notify the office administrator of these matters. Mr. Bowen then confirmed the screen's implementation with the office administrator, selected three firm attorneys who shared neither secretaries nor legal assistants with Ms. Martin and whose offices were located on a different floor than that of Ms. Martin, and advised these attorneys of the screen. (Docket Entry No. 211, ¶¶ 11-14).

In further directing the implementation of the firm's screening procedures, Mr. Bowen instructed his assistant to segregate the casefiles in an empty office across from her desk, to place a restrictive chartreuse label on the files which reads "THIS FILE SHALL NOT UNDER ANY CIRCUMSTANCES BE MADE AVAILABLE TO OR DISCUSSED WITH OR IN THE PRESENCE OF: AMY MARTIN", and to place a sign on the door of the file room that reads "RESTRICTED ACCESS -- AMY MARTIN MAY NOT ENTER THIS ROOM" (Id. at ¶ 15). The label and sign described above are attached as exhibits eight and nine to Mr. Bowen's supplemental declaration. On May 23, 2001, all firm personnel were notified of the implementation of screening procedures with respect to Ms. Martin (Id. at ¶ 18 & Exh. 11, p. 63). After receiving plaintiffs' correspondence objecting to their representation of the Time Warner defendants, the Bowen firm submitted the matter for independent review and advice as to their compliance with ethical obligations, the

results of which were consistent with their continued participation in this lawsuit (Id. at ¶¶ 18-19).<sup>5</sup>

In evaluating the screening mechanisms at issue in Clinard, the Supreme Court addressed the relevant factors set out above<sup>6</sup> by reference to the size of the infected attorney's new firm, the contents of the firm's screening policy, the measures actually taken to screen the infected attorney, the sharing by the infected attorney of legal fees from the firm's representation, the location of the infected attorney's office relative to the attorneys involved in the representation, and any evidence of actual sharing of confidences by the infected attorney. Here, as in Clinard, the Bowen firm's screening procedures, though unfortunately not reduced to writing, have been confirmed by objective and verifiable evidence, and are very nearly identical to the written procedures found adequate in Clinard; there is no evidence to suggest that any confidences were actually shared by Ms. Martin with anyone at the Bowen firm,

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<sup>5</sup> While plaintiffs' counsel decries the revelation at this stage of the proceedings of these measures taken by the Bowen firm, when no mention had been made of such consultation in prior motion practice or at the hearing (see Docket Entry No. 214, ¶ 6), they do well not to question the value of such measures. Indeed, their position in response to the Time Warner defendants' motion for disqualification would have been much more easily defended had they taken such precautionary measures to confirm their own, hardly disinterested conclusion that no conflict existed in their prosecution of this lawsuit against the Time Warner defendants.

<sup>6</sup> Supra at 4.

nor evidence of any communications being made in contravention of the screening policy<sup>7</sup>; and, Ms. Martin is a non-equity member of the Bowen firm and thus has not shared directly in any fees generated by the representation. Unlike the infected attorney in Clinard, Ms. Martin's office was located on a different floor than the attorneys participating in the representation. This physical separation allows the Bowen firm, despite its small size (less than twenty attorneys) as compared with the firm in Clinard (one hundred attorneys), to more easily ensure the integrity of the screen by minimizing contact between Ms. Martin and the file room, any client conferences, and the participating attorneys. While Mr. Bowen, aware of Ms. Martin's potential conflict, should not have enlisted her assistance in procuring a copy of the complaint from her old firm, that moment of indiscretion does not upset the balance of factors demonstrating the effectiveness of the screen imposed by the firm.<sup>8</sup>

Accordingly, in light of Clinard and the evidence

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<sup>7</sup> Though plaintiffs have suggested the impropriety of any conversation between Mr. Bowen and Ms. Martin after her conflict was disclosed, the undersigned is not persuaded that the exchanges that occurred between the two involved anything other than matters of administrative concern properly the subject of conversation between a firm leader and a new associate.

<sup>8</sup> It is noted that King & Ballow expressed no concern over the request at the time. In fact, the cover letter accompanying the copy of the complaint expressed pride in the work that went into producing it, rather than any objection to the request. Indeed, given the number of defendants named, King & Ballow should have anticipated that any firm requesting a copy of the complaint would likely be representing one or more defendants.

presented in the papers and at the hearing, the undersigned concludes that the presumption of shared confidences has been adequately rebutted in this case.

While the Tennessee Supreme Court has made paramount the duty of "[e]very lawyer . . . to avoid not only professional impropriety but also the appearance of impropriety", Tenn. Code of Prof'l Resp., Canon 9, EC 9-6, the undersigned concludes that no such appearance is given here. In Clinard, the Court stated that

[w]e recognize that disqualification of one's counsel is a drastic remedy and is ordinarily unjustifiable based solely upon an appearance of impropriety. We remain convinced, however, that in a rare case, even one in which screening procedures were used effectively, the taint of the appearance of impropriety can be purged only by disqualification. This is one such case.

2001 WL 530834 at \*7. While the Court in Clinard analogized to baseball, stating that the infected attorney had "switched teams in the middle of the game after learning the signals", id., here the same can hardly be said. In fact, to use the Supreme Court's analogy, though Ms. Martin switched teams, she did so before the lineups were finalized and the anthem sung. Moreover, the infected attorney in Clinard had represented the clients to which his new firm was adverse for many years as their personal attorney, while Ms. Martin was a new associate employed by King &

Ballow for a mere eighteen months, only a few of which overlapped the firm's representation of plaintiffs here. Thus, the undersigned is confident that a reasonably informed layperson would not view the circumstances of this case with distrust, and that this is not such a "rare case" where "the taint of the appearance of impropriety can be purged only by disqualification." Id.

B. The Time Warner Defendants' Motion to Disqualify King & Ballow As Against the Time Warner Defendants

The Time Warner defendants, all subsidiaries of AOL Time Warner, Inc., seek the disqualification of King & Ballow based on the latter's ongoing representation in an unrelated case of Time, Inc. d/b/a Sports Illustrated ("SI"), another subsidiary of AOL Time Warner, Inc., and therefore an affiliate of the Time Warner defendants (though affiliated to a different degree relative to the parent and doing business in a different industry, i.e., news media versus recording). Citing Disciplinary Rule 5-105(B) of Canon 5 of the Tennessee Code of Professional Responsibility, the Time Warner defendants argue that King & Ballow has divided its loyalties by litigating both for and against subsidiaries of AOL Time Warner, and that the firm is therefore laboring under a disabling conflict of interest in its prosecution of this lawsuit on behalf of plaintiffs.

Disciplinary Rule 5-105(B) provides that

[a] lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

The lone exception allowing multiple employment, contained in subsection (C) of DR 5-105, applies if the lawyer obtains the consent of both clients after "full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Here, it is undisputed that King & Ballow did not obtain the consent of either plaintiffs or SI before commencing this litigation, nor did they seek the advice of the bar's disciplinary counsel or an outside attorney as to their compliance with ethical standards in maintaining concurrent representation. It bears repeating here that, as the undersigned initially noted at the hearing, the failure of King & Ballow attorneys to consult anyone but themselves in concluding that such concurrent representation was ethical, or to at least advise both clients of the situation prior to filing the complaint in this matter, was the height of folly, and under different circumstances might well have resulted in disqualification. Nevertheless, the undersigned is persuaded by the weight of

authority cited by plaintiffs for the proposition that subsidiary or otherwise affiliated corporations are separate entities with no unity of interests for conflict purposes despite their common parentage,<sup>9</sup> and therefore concludes that King & Ballow's loyalties are not divided by its concurrent representation of SI and plaintiffs here.<sup>10</sup>

The Time Warner defendants concede that "the companies related to or affiliated with [AOL Time Warner] are separate and independent from each other and have distinct corporate forms and management albeit all owned and managed by the same parent company." (Docket Entry No. 193 at 3). However, they

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<sup>9</sup> See, e.g., Apex Oil Co., Inc. v. Wickland Oil Co., 1995 WL 293944 (E.D. Cal.), where the court, applying a similar disciplinary rule, found that not even parent and subsidiary corporations, much less co-subsidiary corporations, are considered the same client for conflict purposes unless the separate entities are in reality the alter egos of one another. Here, it is apparent that SI and the Time Warner defendants are not alter egos of one another, given their association with different industries and their separate corporate forms, boards of directors, legal counsel, etc.

<sup>10</sup> The undersigned notes that plaintiffs' argument of their opposition to the motion under the American Bar Association's ("ABA") Model Rules of Professional Conduct is misguided insofar as that argument is for direct application of the Model Rules, rather than application by analogy. As pointed out in the Time Warner defendants' reply brief (Docket Entry No. 193), the Model Rules simply do not supply the controlling ethical standards, inasmuch as they have not been (and may never be) adopted by the Tennessee Supreme Court. The case law cited by plaintiffs is nonetheless persuasive in its reasoning; however, the undersigned will again take the opportunity to voice his considerable displeasure with the use of such misleading quotations as that employed at page eleven of plaintiffs' response (Docket Entry No. 137), wherein plaintiffs indicate this Court's deference to the ABA by pointing out that "this Court's Local Rules specifically thank the ABA, 'from whose Code of Professional Responsibility portions of these Rules . . . were drawn.'" The language omitted from this quotation is "particularly Rule 3", in reference to the local rule dealing with publicity. With the omission of these few words, the excerpt provided by plaintiffs is deprived of considerable context.

essentially argue that plaintiffs should be estopped from denying these entities' commonality of interests in light of language in the complaint which seeks to hold various of the Time Warner defendants vicariously liable for one another on the theory that these defendants are "divisions and/or alter egos and/or instrumentalities" of each other. Plaintiffs' counsel explained at the hearing, however, that such allegations were directed at those corporations of the same degree of affiliation under the parent AOL Time Warner, and which operate within the same media industry. Therefore, the undersigned agrees that plaintiffs may consistently allege vicarious liability of these defendants while arguing that SI and the Time Warner defendants are entirely separate.

It should also be noted that despite the Time Warner defendants' complaint about King & Ballow's concurrent representation, as of the time of the hearing SI had not terminated its employment of the firm. Defendants' attorneys are also guilty of some exaggeration in their motion -- King & Ballow did not drop SI like a hot potato (see Docket Entry No. 101 at 3 n.1), but in fact expressed a willingness to continue representation coupled with an offer to assist any transition if they were terminated. However, as stated above, it would have been far better if King & Ballow had consulted SI before the

matter came to a head.

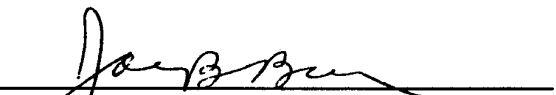
Because King & Ballow has not violated its duty of undivided loyalty with respect to either SI or plaintiffs here, and furthermore because of the practical difficulties and prejudice to plaintiffs that its disqualification as against the Time Warner defendants would impose, the undersigned declines to disqualify the firm from further proceeding against these defendants.

As regards the general view of attorneys held by the public, the undersigned is convinced that far too many motions to disqualify are filed, and that lawyers would better serve their clients and the reputation of the profession by concentrating on litigating the merits of their respective cases, rather than becoming embroiled in protracted litigation to disqualify their opponents, except in clear and egregious cases.

### III. CONCLUSION

In light of the foregoing, both motions to disqualify are DENIED. An appropriate Order will enter.

ENTERED this 12 day of July, 2001.

  
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JOE B. BROWN  
United States Magistrate Judge

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